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THE DECLARATORY JUDGMENT—A NEEDED PROCEDURAL REFORM

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I

The maintenance of the social equilibrium is accomplished by the state through the administration of justice.[1] This is the modern substitute for the primitive practice of self-help. While the dawn of civilization reveals but crude notions of judicial institutions, one of the first manifestations of organized society was the creation of machinery for voluntary arbitration as an optional substitute for private vengeance and self-help, the acknowledged methods of insuring respect for the societal rules. But the decisions of the first judges, who were merely arbitrators, had only a moral force; and if the complaining litigant was dissatisfied with the award, he could still resort to self-help. For its own protection against the resulting anarchy and violence, organized society, having acquired the power, took upon itself the monopoly of administering justice through established courts. But though this evolution is one of centuries, the fundamental theory still prevails that the redress of wrongs is the *raison d'être* both of violent self-help and of its more civilized substitute, the courts; and the notion of vengeance, while rejected by modern schools, is still evident in the penalties imposed in the administration of

[1] The complex relationships involved in the notion of justice are not here of immediate concern. The equilibrium is established through law, which may be called distributive justice, and maintained through the enforcement of law, which may be called corrective justice. It is in this latter aspect of justice that our immediate interest centers. See on the general subject, Pulszky, *The Theory of Law and Civil Society* (London, 1888) ch. XII.

criminal justice and in their tempered and better adjusted substitute, damages, awarded in the administration of civil justice. The commission of wrong, public or private, is essential, so we are taught, in order that the judicial arm of the State may be invoked to restore the social equilibrium.[2] Thus Blackstone says: "The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society."[3] This theory was fundamental in the common law.

Yet a study of modern social and industrial conditions emphasizes the conviction that the social equilibrium is disturbed not only by a violation of private rights, privileges, powers and immunities[4] but by the placing of these individual advantages in grave doubt and uncertainty. If the status of children as legitimate or illegitimate or of persons as married or unmarried is uncertain, not only the individual but the State has an interest in having the uncertainty settled by an authoritative determination. If the title to property is uncertain, the State, as well as the individuals concerned, has an interest in removing the uncertainty, and within certain limitations courts of equity entertain jurisdiction to remove clouds from title.[5] If the meaning of a contract is in doubt, it must be broken in order to obtain an authoritative construction of it, with expensive litigation to boot. Similarly, apart from the trustee's bill for advice, a hostile attack must generally precede the adjudication of conflicting claims under a will. To determine these questions, which are illustrations merely, our law now requires an elaborate procedure involving delay, uncertainty and considerable expense, when all that is desired is an authoritative determination of a simple issue of fact or of law. Parties

[2] Salmond, *Jurisprudence* (4th ed.) secs. 26, 27. Carter, *Law: Its Origin, Growth and Function*, 45 *et seq.*

[3] 3 *Bl. Com.* 2, 15. See also Pound, *Readings on the History and System of the Common Law* (2d ed.) 305 *et seq.* Salmond, *op. cit.* 71: "Justice is administered only against wrongdoers, in act or in intent."

[4] In the course of this study we shall adopt Prof. Wesley N. Hohfeld's valuable analysis of jural relations as first set forth in (1913) 23 YALE LAW JOURNAL, 16. These relations may most readily be presented in Prof. Hohfeld's scheme of opposites and correlatives:

Jural Opposites	right	privilege	power	immunity	
	no-right	duty	disability	liability	
Jural Correlatives	right	privilege	power	immunity	
	duty	no-right	liability	disability	

The importance of this analysis is revealed throughout the subject of declaratory judgments. See particularly *Guaranty Trust Co. v. Hannay* (C. A.) [1915] 2 K. B. 536, 548, Buckley, L. J., and p. 571, Bankes, L. J.

[5] As a rule, however, only where the plaintiff is in possession. The dispute of title to personal property cannot, except in rare instances, be settled in any such manner. See *Infra*, p. 30.

are compelled to indulge in legal hostilities whether they want to or not in order that their legal relations may be cleared of doubt or uncertainty. That the law has not been oblivious to the necessity of certainty and security in legal relations is evidenced in the fact that certain agreements in order to obtain judicial recognition must be reduced to writing or must be recorded. It is also evidenced in the employment of such equitable remedies as bills *quia timet,* bills of peace and bills to remove cloud from title, bills for the rescission and cancellation of written instruments, in the action to perpetuate testimony and in the bill for injunction. While the general purpose of these equitable remedies is to create security, remove uncertainty and prevent litigation,[6] many of the remedies are cumbersome and their grant is dependent upon very technical conditions precedent. Take, for example, the writ of injunction. Aside from its curative functions in affording redress for certain kinds of continuing wrongs, it has important preventive functions. One of the principal conditions of its issuance, however, is the inadequacy of the remedy at law, and as damages are deemed a sufficient palliative for most legal injuries,—again on the theory that justice functions with entire success if it gives money compensation *after* the commission of a wrong—the injunction will be issued but rarely to restrain a breach of contract or a trespass.[7]

[6] The bill *quia timet* is a writ of prevention designed to avoid possible future injury to the applicant's property and to preserve it for its appropriate uses. This is effected by appointment of receivers or conservators to collect income, or by a demand for security. The injunction to prevent waste, etc., is in the nature of a bill *quia timet.* The bill of peace is designed to establish and perpetuate a right or privilege which may be controverted by different persons or at different times and is intended to prevent a multiplicity of suits. The bill to remove cloud from title and the cancellation of outstanding instruments which inequitably affect a person's rights or privileges are in the nature of a remedy *quia timet.* Sometimes the decree may in such cases operate as a declaratory decree. *Infra,* p. 30.

The action to perpetuate testimony, a provisional remedy well known in Anglo-American and in the civil law, is designed to preserve and perpetuate for future use testimony which is in danger of being lost. These equitable remedies are fully discussed in works on equity, particularly in those of Story and of Pomeroy. All these remedies have a limited application, and their grant is conditioned upon the fulfillment of strict preliminary requirements; and while courts of equity have much flexibility in adapting their relief to the situation presented, they incidentally have wide powers in imposing upon applicants for the exercise of their functions such conditions as they may deem necessary to do equity in the case.

[7] Generally only in the case of such contracts as agreements not to carry on a trade, contracts for personal services of exceptional character, certain covenants restricting the use of land, or where some distinctly equitable ground such as the avoidance of a multiplicity of suits can be shown to exist. Usually an injunction against breach will be granted only where specific performance would be decreed. Courts of equity are now somewhat more liberal in granting relief

The limited scope of these various kinds of preventive relief against insecurity and the disturbance of the *status quo* makes it all the more necessary that we examine with care that instrument of preventive relief known to the English and other legal systems as the declaratory judgment. The distinctive characteristic of such a judgment is that it carries with it no coercive decree or order commanding the defendant or the sheriff to do anything, an inherent element of all executory judgments. Its purpose is to afford security and relief against uncertainty and doubt. It does not necessarily presuppose culpable conduct on the part of the defendant, but it enables any party whose rights, privileges, powers or immunities, whether evidenced by a written instrument or not, have been disputed, endangered, threatened or placed in uncertainty by another person to invoke the aid of a court to obtain an authoritative determination or declaration of his rights or other legal relations.

At the outset it will be well to circumscribe the concept of "declaratory judgment." In a sense all judgments of courts declare jural relations, but most of them, being called into operation by some past or immediately threatened violation of a right, are followed by further relief in the form of a judgment for the payment of damages or a decree for an injunction. These judgments require the losing defendant to do something, and may be called executory, *i. e.*, they may be executed. They always involve rights and duties. A second class of judgments likewise determines or establishes a jural relation; yet they are not followed by a decree ordering the performance of some duty but merely by a decree which effects some change of status, the judgment thus constituting merely a source of new jural relations. Such are, among others, judgments of divorce or of annulment of a voidable marriage, appointments of guardians or receivers, admissions of wills to probate, judicial declarations of death or of majority in civil-law countries, the judicial authentication of arrangements in which the public interest requires an official protection of private jural relations, such as liquidations, certain changes in corporate organization,[8] the administration of trusts, etc. They may be the result of contentious or non-contentious proceedings, although the latter are practically administrative rather than judicial functions. These judgments, because they effect a change of status and are primarily a source of new jural relations, may be called constitutive or, as we

by injunction against trespass than were the early chancery courts, but the narrow interpretation of "inadequacy of legal remedy" still confines the injunction to a limited class of trespasses. See *Moore v. Halliday* (1903) 43 Oreg. 243, 99 Am. St. Rep. 742, 72 Pac. 801 and note thereto; *Xenia Real Estate Co. v. Macy* (1897) 147 Ind. 568, 47 N. E. 147 with quotation from Pomeroy.

[8] See *In re Guardian Assurance Co.* [1917] 1 Ch. 431. *Toronto Corporation v. Toronto Railway* (P. C.) [1916] 2 A. C. 542.

prefer to call them, "investitive."[9] The judgment in either of these two actions, which are directed to some relief, may indeed involve solely the determination of a status, *e. g.*, that the petitioner who seeks an order authorizing his inscription as an adopted child,[10] or that the decedent whose will is to be probated, is or was a citizen.[11] But these judgments are, nevertheless, not strictly declaratory. We would confine that term to those judgments which merely declare the existence of a jural relation, *i. e.*, some right, privilege, power or immunity in the plaintiff or some duty, no-right, liability or disability in the defendant. They do not presuppose a wrong already done, a breach of duty. They cannot be executed, as they order nothing to be done. They do not constitute operative facts creating new legal relations of a secondary or remedial character; they purport merely to declare preexisting relations and create no secondary or remedial ones.[12] Their distinctive characteristic lies in the fact that they constitute merely an authentic confirmation of already existing relations.

While the purpose of the declaratory judgment, as Bailhache, J., remarked in *Guaranty Trust Co. v. Hannay,*[13] is not to enable people to "sleep o'nights," such a judgment will be rendered in the exercise of the court's discretion when it will serve some practical purpose; for example, when it will guide parties to a contract as to their future conduct under it, and "with a view rather to avoid litigation than in aid of it." Aside from its employment in cases in which the preventive equitable remedies above mentioned are inapplicable, thus

[9] This Benthamism, whose use may be pardoned, seems more descriptive than the term "titles of right" employed by Salmond, *op. cit.* 91. The term "right" here is too uncertain in connotation. The Germans call these judgments "constitutive." Perhaps a more accurate nomenclature might use the term "divestitive" for those judgments, like the annulment of a voidable marriage or dissolution of partnership, which merely terminate an existing status. See Elemer Balog, *Ueber das konstitutive Urteil* (1907) 34 ZEITSCHRIFT FÜR DAS PRIVAT UND ÖFFENTLICHE RECHT DER GEGENWART, 123-168; also E. Hölder, *Ueber das Klagrecht* (1904) 46 Jhering's JAHRBÜCHER, 282, 306 and Prof. Hellman, *Klagrecht, Feststellungsklage und Anspruch* (1892) 31 *ibid.*, 90, 114; also Hellwig, *System des deutschen Zivilprozessrechts* (Leipzig, 1912) 287.

[10] *In re Hollaender and Donnet* (Sept. 8, 1916, Court of Rouen) reported in (1917) 44 CLUNET, 1009.

[11] *In re Lee's Will* (Mar. 30, 1918, U. S. Court for China) (1918) 27 YALE LAW JOURNAL, 1082.

[12] Strictly speaking, judgments dismissing a complaint are declaratory in their nature, but they differ in principle from those now under consideration in that some coercive relief was asked for. An exhaustive theoretical discussion of the distinction between the declaratory judgment and the executory—also called dispositive or condemnatory—judgment is to be found in F. F. Heim, *Die Feststellungswirkung des Zivilurteils* (Munich, 1912) particularly pp. 45-50, 70-75. This monograph constitutes part 1 of v. 25 of the *Abhandlungen zum Privatrecht und Zivilprozess,* edited by Prof. Otto Fischer.

[13] (K. B.) 113 L. T. 98, 101.

giving relief in a new class of cases, it has by its simplicity and effectiveness served largely to replace those equitable remedies where they were formerly employed; and furthermore, appreciation in practice of the fact that an amicable remedy is often more desirable than and fully as useful as a non-amicable means of adjusting disputes, has persuaded litigants frequently to employ the declaratory action instead of the coercive executory action. Professor Sunderland in an able article on the English declaratory judgment[14] has pointed out that the more highly organized a society is, the less it is called upon to display its power in order to insure obedience for its decrees. The latent power of enforcement, universally realized, makes its exercise generally unnecessary. As Salmond has expressed it:

> "To a large extent already, in all orderly societies, this element in the administration of justice has become merely latent; it is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement."[15]

Even in the international field, less perfectly ordered and least stable among the strata of organized society, only four cases are known among the thousands of awards of arbitral commissions in which there has been a refusal to submit to the award.[16] Here, the arbitrators having no power to enforce their decision, the constraint of public opinion alone compelled obedience. *A fortiori,* therefore, when the State possesses full power to enforce its decrees, legislative as well as judicial, the inclusion of a special command with each decree seems unnecessary. The mere authoritative declaration of the reciprocal rights and obligations of the parties suffices to insure obedience; but should a losing party charged with duties actually prove recalcitrant, it is very simple, in view of the fact that the declaratory judgment is *res adjudicata,* to obtain an ordinary judgment upon which a writ of execution may issue.

Up to the present time, with the exception of that class of judgments which we may call purely "investitive," such as decrees of divorce, discharges in bankruptcy, appointments of receivers, etc., which do not operate as remedies for wrongs, but merely as creators of new jural relations, our actions and the resulting judgments are directed to immediate coercive relief from the court, either by way of damages, injunction or some other command or decree. The very form of the

[14] *A Modern Evolution in Remedial Rights—the Declaratory Judgment* (1917) 16 MICH. L. REV. 69. This is the only monographic study on the subject in the English language known to the writer, with the exception of a brief article on the Scotch action of declarator in (1849) 41 LAW MAGAZINE 173.

[15] Salmond, *op. cit.* 66.

[16] Three of these were based upon an alleged departure by the arbitrator from the terms of the *compromis.*

demand by the plaintiff indicates a recalcitrant or culpable defendant and the scene is set for legal war. As Professor Sunderland has pointed out, the declaratory action, in cases where the plaintiff does not demand coercive relief, leads to the same effective result as the hostile action for damages or an injunction, with much simplified procedure and under the assumption, justified in most cases between responsible litigants, that both parties wish to do right and act honestly. The issue is framed for the answer of the court in a stated question, for example, "whether the assignment by F. T. B. . . . was void as against his trustee in bankruptcy"[17] or the plaintiff claims a declaration "that the defendants . . . in respect of the lands in question were not entitled to exercise the power of entry, etc.;[18] and the facts being before the court, in contradistinction to the procedure on demurrer, the specific issue of law is answered usually by a simple "yes" or "no" or by a mere grant or refusal of the declaration requested. The request for a declaration is very frequently accompanied in a separate prayer by a demand for coercive relief in the form of injunction or other decree, the advantage being that even though the injunction may be refused, the declaration of the legal relations of the parties may still be made and the parties will govern themselves accordingly.[19] This usually serves the plaintiff's purpose and renders further assistance from the courts unnecessary.

The close analogy between the declaratory judgment and arbitration will already have become apparent. In countries authorizing the declaratory judgment, the law now furnishes parties with official

[17] *In re Bulteel's Settlements* [1917] 1 Ch. 251, 255.

[18] *Taff Vale Railway v. Cardiff Railway* (C. A.) [1917] 1 Ch. 299, 302. Even before the enactment of 15 & 16 Vict. ch. 50, sec. 86 (1852) which is generally regarded as the first legislative authorization of the declaratory judgment, Parliament had enacted in 1850 an Act, 13 & 14 Vict. ch. 35, sec. 1, "to diminish the delay and expense of proceedings in the High Court of Chancery in England," reading in part as follows:

"That it shall be lawful for Persons interested or claiming to be interested in any Question cognizable in the said Court as to the Construction of any Act of Parliament, Will, Deed, or other Instrument in Writing, or any Article, Clause, Matter, or Thing therein contained, or as to the Title or Evidence of Title to any Real or Personal Estate contracted to be sold or otherwise dealt with, or as to the Parties to or the Form of any Deed or Instrument for carrying any such Contract into effect, or as to any other Matter falling within the original Jurisdiction of the said Court as a Court of Equity, or made subject to the Jurisdiction or Authority of the said Court by any Statute not being One of the Statutes relating to Bankrupts, and including among such Persons all Lunatics, married Women, and Infants, in the Manner and under the Restrictions herein-after contained, to concur in stating such Question in the form of a Special Case for the Opinion of the said Court, and it shall also be lawful for all Executors, Administrators, and Trustees to concur in such Case."

[19] See, for example, *London Assn. of Shipowners etc. v. London & India Docks, etc.* (C. A.) [1892] 3 Ch. 242, where the claim for injunction was abandoned; *Llandudno Urban Council v. Woods* [1899] 2 Ch. 705, where an injunction was refused.

"arbitrators" whose function it is to declare the legal relations existing between the parties and the law endows their decision with binding force. The strongest attestation of the efficacy of this procedure is the increasing frequency with which it has been resorted to in the English courts. Of the official reports of cases in the Chancery Division in 1884, 34 per cent were declaratory actions; in 1916, based upon the cases reported in 2 Chancery Division this percentage had risen to 67 per cent and in 1917 it reached 66 per cent. There is every probability that recourse to the declaratory action will continue to increase. The great merits of the procedure, as evidenced by its constant employment in England, Scotland, Ireland, India, Ontario, British Columbia, and other Canadian provinces, in Australia, New Zealand and several of the Australian states, and in Germany and Austria commend it to the American legal system as a reform worthy of adoption.

Before entering upon an account of the historical development of this important institution and an analysis of the various classes of cases in which it has been employed, it seems desirable to call attention to the fact that the declaration may be requested by the plaintiff and made by the court either in the affirmative or in the negative form. While all jural relations necessarily involve their correlatives and their corresponding opposites in the other party, the affirmative form of declaration is apparently generally employed where the plaintiff asserts his own right or power or the defendant's duty or liability. For example, A asks a declaration of his right of way over B's land or of his power to assign a certain lease without the landlord's consent; or he may ask a declaration that B is indebted to him for a year's rent or that B is responsible for the debts that may be contracted by his wife. The affirmative form of declaration is usual when the plaintiff's cause of action is one in which he might have been able to obtain coercive relief but is satisfied with a declaratory judgment.

The second or negative form of declaration affords in certain cases a novel kind of relief, to be explained presently. It is usually under the form of a negative declaration that the plaintiff asserts his privilege or immunity or the defendant's no-right or disability (no power).[20] For example, B may ask a declaration that he is not obliged to return to A a sum of money previously paid to B (privilege); or that he is not subject, as a non-resident, to the payment of certain taxes (immunity); or, he may claim a declaration that A has "no-right" to walk over his land; or, being himself a remainderman, he may ask a declaration that the defendant, a life tenant, has no power (*i. e.* is under a disability) to convey the fee simple. In some of these cases, notably in the first two, the plaintiff has no cause of action, yet by

[20] See Prof. Hohfeld's scheme of jural opposites and correlatives, *supra*, note 4.

reason of the declaratory procedure he is enabled as "equitable" plaintiff (prospective legal defendant) to bring the defendant into court and to compel him to prove his claim or be barred from asserting it thereafter against the plaintiff. The plaintiff asserts his privilege or freedom from the claim of the defendant. This valuable form of relief by way of negative declaration of privilege has been consciously admitted in England only since 1915, when the important case of *Guaranty Trust Co. v. Hannay*[21] was decided by the Court of Appeal, two judges deciding in favor of the negative declaration and one against it.[22] In that case, certain bills of exchange supported by certain forged bills of lading purporting to represent cotton were purchased by the Guaranty Trust Co. of New York. They were accepted in England by Hannay & Co. and paid. It was then discovered that the bills of lading were forged and did not represent goods actually shipped. Hannay & Co. brought an action in the federal District Court in New York to recover the money they had paid the Guaranty Trust Co., alleging that the bills of exchange were non-negotiable and conditional upon the actual existence of cotton.[23] The federal Circuit Court of Appeals held that the decision depended upon English law, whereupon the Guaranty Trust Co. brought an action in England for "a declaration that the plaintiffs are not liable to repay to the defendants any sums paid by them" in respect of these bills of exchange. The defendants denied the jurisdiction of the court to make such a declaration, inasmuch as the plaintiffs had no "cause of action"; and certain English courts[24] had indeed considered this a condition precedent to a "declaration of right" as it is called by the English Order XXV, rule 5, of the Rules of 1883 of the Supreme Court. That rule reads:

> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

Bulkley, L. J., held that the cause of action here being in the defendant and not in the plaintiff, no declaration could be made.[25] Pickford,

[21] (C. A.) [1915] 536.

[22] The term negative declaration is not used in England, although it is in Germany. This particular form of declaration has been used in Scotland for 300 years and on the continent of Europe probably longer. Its history will be set forth presently.

[23] (1911) 187 Fed. 686; (1913) 210 Fed. 810. For a Comment on this case, see (1918) 27 YALE LAW JOURNAL, 1046.

[24] *Brooking v. Maudsley, Son & Field* (1888) 38 Ch. D. 636, 646; *Williams v. North's Navigation Collieries* [1904] 2 K. B. 44, 49; *North Eastern Marine Engineering Co. v. Leeds Forge Co.* [1906] 1 Ch. 324; (C. A.) [1906] 2 Ch. 498; *Offin v. Rochford Rural Council* [1906] 1 Ch. 342.

[25] [1915] 2 K. B. 548.

L. J., relying principally on two earlier cases[26] in which the question had not been specially raised, and not wishing to narrow the court's power, held, while considering the exercise of the power very exceptional, that the court had jurisdiction to make the declaration asked.[27] Bankes, L. J., believed that while a cause of action was necessary in view of the phrase "declaration of *right,*" whereas plaintiffs asked a declaration of their freedom from a duty (*i. e.,* a privilege), still the first part of the rule which speaks of "declaratory judgment or order" gave the court power to make a declaratory order, without limiting it to a declaration of "right" and the second part of the rule contemplates a person seeking "relief," which is not confined to relief in respect of a cause of action.[28] While this may be *dictum,* the opinion constitutes a most exhaustive discussion of this phase of the declaratory action; and while the grounds of the decision are not entirely satisfactory—for two of the three judges seemed to think that the plaintiff ought to have an affirmative cause of action—subsequent decisions during the last two years have placed it beyond doubt that the negative form of declaration is within the jurisdiction of the court.[28a] It is interesting to observe that the term declaration of "right"—which was probably not meant in the narrow yet technically correct sense in which Bankes, L. J., interpreted it, namely, as excluding privilege, power or immunity—is in the German code of civil procedure of 1877 converted into the term declaration of "legal relations," and in the Specific Relief Act of India of the same year, though called a declaration of "right," is by the authoritative illustrations which accompany the statute applied not only to rights but to other jural relations as well.

HISTORICAL DEVELOPMENT

(a) ROMAN LAW

The affirmative declaratory judgment finds its origin in the Roman law. In the Roman law of procedure, as in our own, the action at law led to an executory judgment, *condemnatio.*[29] But it often proved necessary to decide in a preliminary way certain questions of law or

[26] *London Assn. of Shipowners etc. v. London & India Docks etc.* (C. A.) [1892] 3 Ch. 242; *Dyson v. Attorney-General* (C. A.) [1912] 1 Ch. 158.

[27] [1915] 2 K. B. 565.

[28] *Ibid.* 574.

[28a] *Infra,* notes 307 *et seq.*

[29] In this word *condemnatio,* which was a civil executory judgment commanding that something be done, *e.g.,* that damages be paid, the underlying theory that judicial relief involves the redress of wrongdoing becomes clear. Only proceedings which led to a *condemnatio* were called actions in the classical Roman law; with the exception of "investitive" judgments, *e.g.,* judgments of divorce, the appointment of receivers, etc., this still appears to represent the conception of actions in our law.

of fact which the parties themselves, by agreement, or the magistrate or *praetor,* at the request of one of the parties, might submit to the *judex* for decision. This decision was merely a declaration of the *judex* in response to the question submitted. Instead of commanding the performance of some act, his decision constituted merely the affirmation of an existing state of facts or of law. Being merely incidental or preliminary to an ordinary executory action, it was known as a *prae-judicium.* It ended in a *pronuntiatio,* not in a *condemnatio.* In the period of the *legis actiones* this *pronuntiatio* was obtained by means of the *sponsio,* so far as the question was not taken up in the *legis actio* itself. In the formulary procedure the form of submission was greatly simplified. In the *intentio* the formula stated the specific question of law or fact which had to be determined; it was much like the regular formula for the trial of an action, except that the *condemnatio* was omitted.

This procedure proved so useful that it was ultimately extended to independent actions where no executory judgment (*condemnatio*) was required or desired. The actions then received the name *actiones praejudiciales,* the dignity of *actiones* having theretofore been denied them.[30] In application they were limited to certain classes of cases, principally questions of status and of certain property rights and relations incidental to status, such as the amount of a wife's dowry which had to be returned to her on the termination of the marriage, and, less frequently, questions of the validity of legal instruments. These actions, which were personal actions *in rem,* are grouped by Windscheid as including questions of *status libertatis, civitatis, familiae.* The questions, among others, more frequently submitted to determination related to the status of and property in slaves; declarations of liberty; questions of the power of the master, and of the father over his children; questions of legitimacy and of family relationship; the validity or invalidity of a will (*querela inofficiosi testamenti*)[31] and of other legal instruments.[32]

[30] Some authorities assert that they are still merely interlocutory judgments; but while of course it was always possible to follow them with an executory action, this was so frequently not done that their independent status came to be recognized. Gaius is our principal source of knowledge on the subject of the *actiones praejudiciales.*

[31] See 1 Bekker, *Die Aktionen des römischen Privatrechts* (Berlin, 1871) ch. 14, p. *272 et seq.* The form of the action really makes this an action for a declaration of the invalidity of a will.

[32] A vast amount of learning in the literature of the Roman law has been devoted to the elucidation of the *actiones praejudiciales.* Of that examined, the following may be recommended as the most useful. 4 Gaius (Poste's 3d ed.) sec. 44; 1 Bekker, *op. cit.* 283 *et seq.;* 2 Bethmann-Hollweg, *Der römische Civilprozess* (Bonn, 1865) sec. 97; Windscheid, *Lehrbuch des Pandektenrechts* (5th ed.) sec. 45, pp. 111-112; sec. 122, pp. 360-361; Baron, *Pandekten* (9th ed.) sec. 80, p. 161; and a valuable monograph by Degenkolb, *Einlassungszwang und*

It is interesting to observe that in the development of the declaratory judgment during the Middle Ages and after the "reception" of Roman law in continental Europe in 1495, questions of status, of property rights connected therewith, and of the validity or invalidity of wills and other legal instruments, constitute the principal subjects of declaratory actions. At the present time, however, instead of being confined to a limited number of subjects with individual forms, the declaratory action is almost unlimited as to subjects and has a general form sufficiently wide to accommodate any specific questions.

That the declaratory action is in effect an action for the security and protection of existing rights, privileges, powers or immunities is made evident by tracing the history and purpose of the negative form of declaratory judgment. By this action the plaintiff asks a declaration that the defendant has no right as opposed to the plaintiff's privilege, *i. e.,* that the plaintiff is under no duty to the defendant, or that the plaintiff is under an immunity from any power of or control by (*i. e.,* there is a disability of) the defendant. The danger of uncertainty and insecurity of rights and other jural relations against which the declaratory action was designed to guard was threatened in one of two ways—either by the defendant's denial of well-established and well-founded rights or other legal relations, or by the defendant's assertion of unfounded claims. It was to meet the second class of danger that the negative declaratory action was invented. The classical Roman law hardly knew this remedy at all, except with respect to the *actio negatoria utilis,* to protect a possessor or pledgee against claims conflicting with the exercise of his rights, etc., in property. In the Code of Justinian[33] the first mention is to be found of the so-called

Urteilsnorm (Leipzig, 1877), 96, 131, 146-168, 187 *et seq.* Degenkolb, p. 188, points out certain remedies of the Roman law which are in the nature of declaratory actions, all of which are directed to the security of the plaintiff, *e.g.,* the *interrogationes in jure,* the action arising out of non-delivery of a receipt, the demand for a bond (*cautio*), and the *liberationis condictio,* or release from a possibly existing obligation (but not the establishment of a *non debet*).

Some writers place in a separate category the summary action on bills of exchange and other commercial documents which carry with them, after formal acknowledgment or admission of the signature of the party charged, a right to the immediate issuance of a writ of execution. The party charged must then give bond to stay the execution. This procedure is known to most of the civil law countries, which endow commercial contracts with a special sanctity and protection. See Borchard, *Guide to the Law and Legal Literature of Argentina, Brazil and Chile* (Washington, 1917) 95, 408. The procedure for securing the debtor's acknowledgment of his signature has some resemblance to the declaratory action. It is aimed primarily at recognition or admission by the party defendant rather than at declaration by the judge, although this is its subsidiary purpose, should the defendant refuse his recognition. See Leonhard, *De natura actionis quae praejudicialis vocatur* (Leipzig, 1874) 17 *et seq.*

[33] Code, 7, 14, 5. A translation of the passage is to be found in DeVillier's edition of Voet's *Commentary on the Pandects* (Cape Town, 1900) Book XLVII, Tit. 10, p. 143.

Lex Diffamari, embodying a rescript of one of the emperors to a certain Cresceus whose status some one had disparaged by asserting that he was not free-born. The passage authorized the person slandered to cite the adverse party, and if the latter failed to prove his assertion he was to be ordered to keep silent. Primarily this involved both a declaration of privilege and of a right, followed by an executory injunction.

The real development of this form of relief by action is to be found in the Roman civil law of the Middle Ages, notably in Italy. Among the several forms of protection against the assertion of unfounded claims which grew up at that period, four received extended application: (1) the *provocatio ex lege diffamari,* which affords the broadest foundation for the modern negative declaratory action, and the *provocatio ad agendum ex lege si contendat;*[34] (2) the so-called *querela nullitatis,*[35] upon which the modern civil-law actions declaring the nullity of legal transactions is founded;[36] (3) the so-called *liberationis condictio;* and (4) the *actio negatoria utilis.*[37] There were of course certain additional remedies to assure protection against unfounded claims, but these were usually incidental to some coercive relief which was prayed. These are the protection of possession against the *turbatio verbis* through the assertion of false claims, and the flexible *imploratio judicis* for the determination of privilege or non-liability, *i. e.,* immunity.[38]

This variety of measures for the protection of security would indicate that society during the Middle Ages was more sensitive than were the Romans to the social and individual danger of insecurity arising out of uncertainty of legal relations. This is traceable in two

[34] By this proceeding the surety could require the creditor to bring his action against the principal debtor, under penalty of discharging the surety from all further liability. Baron, *op. cit.* 480. Similar relief may be obtained by our bill *quia timet* by which the surety can require the debtor to discharge the debt or the creditor to sue the debtor. *Hayes v. Ward* (1819, N. Y.) 4 Johns. Ch. 123, 131; *Wright v. Simpson* (1802) 6 Ves. 734.

[35] Baron, *op. cit.* 124; Windscheid, *op. cit.* 223, note 6.

[36] Probably most legal systems provide for a judicial declaration that a void act is void; this is the purpose of the French *action en nullité* and of the German *Nichtigkeitsklage.* The Anglo-American law has inherited from the civil law a somewhat similar procedure in the case of marriage void *ab initio.* But beyond this, in our law, such a declaration would only be incidental to an action for some further relief, such as setting aside or ordering the destruction or delivery up of a void instrument; and many courts refuse such relief in the case of an instrument void on its face on the ground that its admitted invalidity is without further relief a sufficient protection against unfounded claims based upon it. Such a decision would in effect be a declaratory judgment. So also, a decision declaring the unconstitutionality of a statute.

[37] For the protection of privileges and immunities with respect to property. The privileges would, of course disclose the additional presence of rights in case of an active attempt to interfere with the exercise of the privileges.

[38] Degenkolb, *op. cit.* 203, 204.

well-known legal phenomena of that period: the conceptions (a) that it was a personal injury in the nature of slander to have an unfounded action brought against one; and (b) that society had an interest in the protection of the *status quo*. While an action is a method of restoring a disturbed legal equilibrium and therefore an aid to ordered community life, it nevertheless constitutes a disturbance of the peace of the person threatened with it. For him it is a vacillation between war and peace. Owing to this dual conception, and to the theory that by awaiting a time unfavorable to the defendant for bringing suit the plaintiff was in fact abusing his privilege of resorting to the courts—a kind of slander by way of action—the procedure was invented of enabling the prospective defendant to appear as plaintiff with the power to compel his opponent to come forward with his claim, prove it, or ever after remain silent (*poena perpetui silentii*). In this *provocatio ex lege diffamari* lies the origin of the negative declaratory action. Confined at first to a remedy against the untimely institution of a suit against the plaintiff, it soon developed into a remedy against the institution of an unmeritorious or unfounded suit, by compelling the defendant to bring his threatened claim to action at once or be thereafter barred from asserting it.[39] Against the assertion of an unfounded money demand, the *provocatio diffamari* was aided by the *liberationis condictio* and the *imploratio judicis* for the declaration of plaintiff's freedom from duty or liability.[40] It may again be noted that these remedies are independent of any tortious conduct on the part of the person against whom they are directed.

Just as the *provocatio ex lege diffamari* was extended to substantive claims of all kinds, so the *provocatio ex lege si contendat* was extended beyond the surety's action to protect himself from liability to other actions in which the plaintiff alleged that a defense now available to him might be lost by the defendant's delay in instituting against him an action to which he had a valid defense. Both proceedings, which tended to become interchangeable, looked to the assertion of the plaintiff's privilege as against unfounded claims of the defendant.

(b) MODERN LAW

After the "reception" of the Roman law in central Europe both forms of declaratory action, the positive and the negative, were recognized, and down to the end of the nineteenth century the codes of civil procedure of numerous states provided for the *praejudiciales*

[39] The general *provocatio* was a proceeding in the nature of a suit to quiet title directing all persons adverse to come forward with their claims or be barred. Degenkolb, *op. cit.* 207. There is, of course, a close relation between this development of the *provocatio diffamari* and the slander of title, against which the old Roman law had provided a remedy. But this required more than the threat of an action.

[40] By way of the *querela nullitatis*.

actions and for the *provocatios*. In western Europe they do not appear to have acquired great vogue, although the canon law gave vitality to the *provocatio ex lege diffamari* (the negative form of declaration) in reference to questions of status and particularly to one of its important forms, the jactitation proceeding, as applied especially to marriage.

France. That the early French law was familiar with declaratory actions is shown by Merlin, who in his *Répertoire universel . . de jurisprudence* defines a *"déclaration"* as *"l'action de déclarer, de faire connaître,"* and mention is made of the declaration of a mortgage and of legitimacy. Jactitation proceedings were given wide application to various branches of the law in France up to the enactment of the code of civil procedure in 1807, when this form of proceeding failed of mention. Nevertheless, for some years thereafter and down to comparatively modern times, the French law reports occasionally disclose a case in which the plaintiff asks the court to declare that the plaintiff has a right or power or that the defendant who has threatened him with an action or adverse claim has no right against him.[41] Merlin states that the civil code has not abrogated the *diffamari* law.[42] The modern commentators, however,[43] and several recent decisions[44] take the position that the *diffamari* procedure or *action de jactance ou provocatoire* is no longer admitted in French law, possibly because of a general aversion of the French law to a determination of interests *in futuro*. They give wide application to the action for the perpetuation of testimony, which serves to prepare for a future action for coercive relief; and slander in all its forms—of reputation, of credit or of title—formerly a frequent subject of declaratory action, is more easily the subject of a successful action for damages than it is with us. One of the familiar kinds of declaratory action in the French code is the proceeding for the authentication of written instruments, by which the court is asked to declare whether the instrument is genuine or spurious.[45] This procedure was taken over by the German code of civil procedure of 1877;[46] but it goes little beyond ascertaining whether the document is genuine or forged, and serves principally as an authentic means of proof. The declaration is, however, *res judicata*, and thus differs from the proceeding to perpetuate testimony. The French law recognizes the function of the

[41] See under the heading *"Action en justice"* in 1 Fuzier-Herman, *Répertoire Général Alphabetique du Droit Français*, 304-305, the cases mentioned in secs. 103, 106, 107, 111, 113.

[42] Répertoire, s. V° *Diffamari*.

[43] See 1 Glasson, *Précis de procedure civil* (2d ed.) 227, 228.

[44] *Cosnac v. Choppin d'Arnouville* (1888) Dalloz, *Jurisp. Gén.* 417 and note thereto; *Longuety v. Société des ciments* (1898) Dalloz, *Jurisp. Gén.* 420.

[45] Glasson, *op. cit.* 511.

[46] Sec. 231; sec. 256 of the amended code of 1898.

courts to pronounce the nullity of acts or transactions made void by the substantive law. By statute they have recently authorized the investigation of paternity by an illegitimate child; and this results in a declaratory judgment of paternity.

With this, the catalogue of declaratory judgments of the modern French law may be said to be exhausted. France has no general statute authorizing a declaratory judgment. But while the institution has fallen into disuse in modern France, it was from the France of the fourteenth and fifteenth centuries, with contributions from ecclesiastical law, that it found its way into Scotland, where it has developed and flourished and whence, in 1852, it worked its way into English practice. Before taking up the Scotch development, however, the law in certain other countries will be mentioned.

Germany. The German code of civil procedure of 1877, following the practice of various German states, adopted the declaratory judgment, both affirmative and negative, in its widest application. Section 231 of that code (256 of the revised code of 1898) reads as follows:

> "An action may be brought for the declaration of the existence or non-existence of a legal relation (*Rechtsverhältnis*) or for the declaration of the genuineness or spuriousness of a legal instrument, provided the plaintiff has a legal interest in having the legal relation or the genuineness or spuriousness of the instrument determined by a judicial decision."[47]

In addition the code provides in sections 633, 638 and 640 for a judicial declaration of the existence or non-existence of a marriage or of the relation of parent and child or of paternal power of the one over the other.

There are in addition certain special laws which authorize a declaratory judgment in particular cases, *e. g.,* the determination of the relationship of dependents to a deceased person under various accident insurance laws;[48] the determination of the rank of conflicting creditors under the bankruptcy act; and such miscellaneous cases as those concerning conflicts of patent, trademark and design privileges, and

[47] 1 Gaupp-Stein, *Kommentar zur Civilprozessordnung* (10th ed.) 578; vol. 2, 618; Seuffert, *Kommentar zur Civilprozessordnung* (7th ed.) 307 *et seq.;* 1 Petersen, *Die Civilprozessordnung* (5th ed.) 492 *et seq.;* 1 Hellwig, *System des deutschen Zivilprozessrechts* (Leipzig, 1912) 280 *et seq.;* Wach, *Handbuch des Zivilprozessrechts* (Berlin, 1885) 13, 52.

The Austrian code of 1895 contains in section 228 the same provision except that after the words "legal relation" that code interpolates the words "or rights." See Fürstl, *Die österreichische Civilprozessgesetze, mit Erläuterungen* (Wien, 1898) 353; Neumann, *Commentar zu den Civilprozessgesetzen vom 1. August, 1895* (Wien, 1898) 535 *et seq.*

[48] Industrial Accident Insurance Law, sec. 77; Agricultural Acc. Ins. Law, sec. 83; Building Acc. Ins. Law, sec. 18; Marine Acc. Ins. Law, sec. 81.

the determination by a court of what is equitable under various circumstances when the parties fail to agree.[49]

The German code also makes provision in section 280 for the interlocutory declaratory decree as follows:

> "Until the conclusion of the verbal proceedings leading to a final judgment, the plaintiff, by widening the complaint, or the defendant by instituting a counterclaim, may ask that a legal relation which in the course of the proceedings became the subject of dispute and upon whose existence or non-existence the decision of the case depends in whole or in part shall be determined judicially."

Practically an identical section (236) is incorporated in the Austrian code of 1895.

It will be observed that section 256 provides for both the affirmative and the negative declaratory judgment. The term "legal relation" which is the subject of declaration is used in the Savignyan sense of "the relation determined by law of one person to another person or group or to things."[50] The relation may be personal, with or without reference to property, *e. g.*, a question of family status or membership in a club;[51] or real, *e. g.*, A's right to an easement over B's land.[52] It extends to all jural relations, whether rights, privileges, powers or immunities.[53] The relation need not be a direct one, *e. g.*, between creditor and debtor; thus, it has been held that two creditors of the same debtor have the necessary "legal relation" to determine their respective claims to a given fund of the debtor; or a creditor and a third person (partnership), for the creditor to obtain a declaration against the partnership of his debtor's interest in the partnership.[54]

It will be noted that the subject of a declaration in Germany is a "legal relation" which, while primarily intended to embrace only the legal bond or association under examination, *e. g.*, debtor and creditor, must necessarily involve the jural relations composing the bond or

[49] These miscellaneous cases are fully set out in the commentaries mentioned *supra*, note 47.

[50] 1 Savigny, *System*, 6 *et seq.*; Windscheid, *op. cit.* sec. 37. It seems preferable to substitute for the word "relation," in its present Savignyan connotation of *vinculum juris*, the word "association" or "bond" and to confine legal relations to relations between persons, although the relations may arise out of or with respect to things.

[51] (1882) 8 R G, 3; (1884) 14 R G, 90. R G is the abbreviation for *Reichsgericht*, the German Supreme Court at Leipzig. The names of the parties are omitted from the official reports of German decisions.

[52] Petersen, *op. cit.* 499.

[53] German Civil Code, sec. 194, 209. Gaupp-Stein, *op. cit.* 607.

[54] (1890) 27 R G. 345; Gaupp-Stein, *op. cit.* 608; or that a certain right is or is not vested in a third person; or that the defendant has or has not a right against a third person. (1898) 41 R G, 345. See also Bähr, *Entscheidungen des Reichsgerichts, mit Besprechungen* (München, 1883) 160.

association as a right, privilege, power, immunity, etc.; whereas the English rule of the Supreme Court under which declaratory judgments are rendered authorizes, under a literal interpretation, only a declaration of "right." The term "right," as we have already observed, was undoubtedly used in that broad and juristically inaccurate sense which includes not only a *right,* but also other jural relations such as privilege, power or immunity and their jural correlatives.[55]

The "legal interest" on the part of the plaintiff which is required as a condition precedent to the making of a declaration may in general terms be described as such an interest as is to be found in the danger of loss or of uncertainty of his rights or other jural relations by a failure of the court to make the declaration. Before the danger has accrued—and the existence of this condition is for the court to determine—the plaintiff's "interest" in the declaration is considered insufficient; in other words, the action is either unfounded or premature. Thus, you cannot have a declaration of your right or privilege against a person who doesn't dispute it, a principle common to all legal systems; a prospective heir cannot during the lifetime of a testator sue for a declaration of the validity or invalidity of the will.[56] The German courts likewise assert a lack of "interest" in the declaration if the legal right to be established is already ascertainable in some other form;[57] a conclusion which the English courts also reach when a special proceeding has been provided by statute for the determination of the particular jural relations in question.[58] On the other hand, a sufficient "interest" is to be found in the dispute of the plaintiff's rights, etc., by one in a position to endanger them should his claims be upheld; even the dispute of present or existing rights, etc., though their enjoyment is to be postponed to the future, dependent on the happening of a condition or the mere lapse of time,[59] will support a declaration. So, in England, the fact that a steamship company might some time wish to use certain docks adjoining those then in use by

[55] *Supra,* p. 10.

[56] Thus, the interest is lacking when the dispute of the plaintiff's rights or an assertion of a conflicting claim emanates from a person whose conduct can have no practical bearing on the legal position of the plaintiff. (1889) 24 R G, 405. (1901) 49 R G, 372. Gaupp-Stein, *op. cit.* 609. So a partner before the termination of the liquidation proceedings cannot sue for a declaration of disputed claims; nor can a registered association sue dropped or resigned members for the declaration of a possible liability to share in taxes. (1882) 8 R G, 72, 74; Petersen, *op. cit.* 505. See to the same effect the Scotch decisions, *infra,* note 155.

[57] Gaupp-Stein, *op. cit.* 612, 613 and cases there cited in notes 90-92.

[58] *Barraclough v. Brown* [1897] A. C. 615, 623. See also *Magistrates of Rothesay v. The Officers of State* (June 22, 1820, Scotland) Fac. Coll., quoted in (1849) 41 LAW MAGAZINE, 179.

[59] The question of "future" interests as the subject of a declaratory judgment will be discussed in a separate section, *post.*

them was sufficient to justify a declaration that the company was not liable to pay certain illegal charges assessed by the dock company upon the occupants of the docks in question.[60] A sufficient "interest" in a negative declaration is involved in the danger of a criminal prosecution or the liability to a penalty;[61] or in the desire to stop the running of the statute of limitations.[62]

The declaration with respect to the genuineness or spuriousness of a legal instrument, an institution adopted from the French law, goes merely to the determination of its intrinsic genuineness. If its validity or meaning depends upon proof of extrinsic facts, its interpretation and construction will come under the head of disputed or uncertain "legal relations." The declaration of its genuine or spurious character is therefore of evidential value only, but it binds the parties and their privies and has thus, as *res judicata,* an advantage over the proceeding to perpetuate testimony.[63] The action applies to any kind of legal instrument capable of affording evidence of a private jural relation, and the plaintiff must, as in all declaratory judgments, show his "interest" in the declaration requested. The burden of proof of genuineness or spuriousness may rest either on the plaintiff or on the defendant, depending upon presumptions created by the instrument itself and upon the particular matter to be proved. The declaration of genuineness or spuriousness of legal instruments is deemed to be the only exception to the rule that the German courts will not make a mere declaration of facts.[64]

Notwithstanding the wide scope for the declaratory action which is opened by section 256 of the German code of civil procedure, it is worthy of note that probably less than five per cent of the decisions of the Supreme Court are merely declaratory. This may, in part, be due to an early decision of the Supreme Court in 1881 which held that a plaintiff could not in effect take "two bites at the cherry"—if he had available an executory action (*Leistungsklage*) he could not first sue for a declaration of his right (*Feststellungsklage*) and then bring further actions for coercive relief. This would invite a multiplicity of suits.[65] This decision and a few others like it were so severely criticized by Dr. Bähr,[66] one of the draftsmen of the code, as contrary

[60] *London Assn. of Shipowners etc. v. London & India Docks etc.* (C. A.) [1892] 3 Ch. 242.

[61] (1886) 16 R G, 390; (1893) 31 R G, 30; (1909) 70 R G, 371 and *ibid.* 397. See also *Burghis v. Atty. Gen.* [1911] 2 Ch. 139; *Dyson v. Atty. Gen.* (C. A.) [1911] 1 K. B. 410. *China Mutual Steam Navigation Co. v. Maclay* [1918] 1 K. B. 33.

[62] (1889) 23 R G, 346, 348; (1905) 61 R G, 164, 168.

[63] Petersen, *op. cit.* 497, 498; Seuffert, *op. cit.* 312, 313.

[64] *Infra.*

[65] (1881) 4 R G, 437.

[66] Bähr, *op. cit.* 168-170.

to the intent of the statute that the Supreme Court later reversed its position. Experience has shown that after a right has been declared, rarely, if ever, will an action to enforce compliance therewith be necessary. Yet the practice appears to have been considerably influenced by these early decisions; so that a declaratory action is rarely brought if an executory action is available. Certain recent decisions, moreover, while admitting that the requests for a declaration and for coercive relief might be combined in one action, have taken the view that the declaration must be directed to a different end than the executory decree, and that a plaintiff should not request a declaration at all—on the ground that he has no "legal interest" in it—if he might have requested an executory judgment. This now has an additional reason, for the amended code of 1898 provides a form of action for executory judgments with respect to obligations to become due in the future, such, for example, as periodically recurring payments of rent. While such a judgment was formerly declaratory in its nature, requiring a new action, if necessary, upon the former judgment to obtain execution on the due day, it is now an executory judgment on which a writ of execution can immediately issue on the due day.[67] The result is that for the most part the declaratory action in Germany is in practice confined to demands for the enforcement of which an executory action has not yet accrued, and to actions for a negative declaration. The interesting thing to note is that the only case in which under the English Act of 1852 a declaration could be made, namely, where it might, if requested, have been followed by coercive relief, is the particular case in which it could not be sued for in Germany.

Italy. Modern Italy appears to have abandoned the Middle Age declaratory action, for Mattirolo informs us that the only kind of judgment, apart from declarations of nullity, now rendered in Italy are executory judgments.[68]

Spain and Spanish America. Modern Spain and various countries of Spanish-America have inherited through the *Siete Partidas*[69] of the Middle Ages, in the form of the action of *jactancia* (jactitation), the old Roman action of the *lex Diffamari* which enabled a prospective legal defendant threatened with an action to appear as "equitable" plaintiff with the demand that his opponent be compelled to bring his threatened action or to keep silent. These provisions of the *Siete Partidas* have been adopted almost literally in several Spanish-Ameri-

[67] These actions to safeguard "future" interests will be more fully discussed *infra.*

[68] 1 Mattirolo, *Trattato de Diritto Giudiziario Civile Italiano* (4th ed.) 63. For a short historical account of the negative declaratory action, containing a statement that it was expressly omitted from the Italian code with the exception of the creditor's action *ex lege si contendat,* see 1 *Enciclopedia Giuridica Italiana,* pt. V, s. V°, *Azione,* 1116-1117.

[69] Ley 46, tit. II, part. 3a. See 3 *Codigos Españoles,* 30.

can codes[70] and a recent decision of the Supreme Court of Spain[71] affirms the modern survival of the old action of *jactancia* authorized by Law 46 of the *Partidas,* and denies its implied repeal by art. 1976 of the Civil Code. As expressed in the Bolivian code, whence they were directly taken by the codes of Uruguay and Argentina, these provisions read:

> "In case any person boasts or asserts against another matters which cause the latter to lose good reputation or honor, the offended person may require the boaster to bring an action or to keep silence."
> "When a person who must go on a journey by land or sea asserts that another is awaiting the moment of his departure to bring some action against him, he may ask that the latter be compelled to bring his action." (Art. 191.)

Professor Gallinal of Uruguay, an authority on civil procedure, is of the opinion that the action of *jactancia* has outlived its usefulness and should be eliminated from the codes of Latin-America as it has already been in Italy and other states.[72] He suggests replacing it with a general action for a *declaratio juris* or declaratory judgment.[73]

Scotland. The connecting link between the declaratory action of the Middle Ages and modern English law is to be found in the law of Scotland. Just when the declaratory action was adopted in Scotland it is difficult to say. The modern works on Scotch practice disclose no statute or rule of court which expressly authorizes or recognizes the so-called "action of declarator." Inferences as to its origin in Scotland have been indulged. Lord Stair states[74] that "declarators of right proceeded of old by brieve of right which is now out of use." A writer in the Law Magazine[75] points out that the brieve was replaced by the summons in 1532, when the Scotch Court of Session was established. That court was approved by the Scotch

[70] Bolivia, Code of civil procedure, arts. 189, 191; Chile, arts. 258-262, 278; Argentina (Buenos Aires, Capital), arts. 425-432; Uruguay, arts. 259, 260, 863-872. Similar provisions are to be found in the codes of Panama, Costa Rica, Mexico (Federal District) and of other states of Spanish-America.

[71] Decision of Sept. 27, 1912, *Tribunal Supremo,* no. 163 in (1912) 42 JURISPRUDENCIA CIVIL, n. s., 1089.

[72] Rafael Gallinal, *Estudios sobre el Codigo de Procedimiento Civil* (Montevideo, 1907) 105 *et seq.*

[73] The Spanish nomenclature may easily mislead the casual reader in this matter. The *juicio ordinario declarativo* is the usual form of action leading to a judgment which may be executed. The *juicio ejecutivo* is the summary form of action authorized in certain cases of indebtedness on a commercial instrument, provisional execution beginning at once by the issue of a writ of attachment against the debtor who has only a brief time, generally a few days, to put in a defense and stay final execution.

[74] 4 *Institutions of the Law of Scotland* (More's ed. 1832) 4, 1.

[75] (1849) 41 LAW MAGAZINE, 179.

parliament in 1537 and Morrison's *Dictionary* discloses several cases of "declarator," the earliest of which is dated July 16, 1541.[76] The institution has had a history in Scotland, therefore, of nearly four hundred years. As to its sources, it has been suggested that these are to be found (1) in the brieve of right, which was worded like the summons of declarator; (2) in the forms adopted by the old episcopal courts for the administration of the ecclesiastical law, notably the declarations of legitimacy, marriage, and other matters of status;—the form of their judgment ran *"pronunciamus decernimus et declaramus";* and (3) in the forms of the French law, according to which the Court of Session originally administered justice, and which probably contributed, by way of example, to the employment of the declaratory action.[77]

The declaratory action is defined by Scotch institutional writers to be one "in which the right of the pursuer [plaintiff] is craved to be declared, but nothing is claimed to be done by the defender [defendant]."[78] Lord Stair informs us, further, that "such actions may be pursued for instructing or clearing any kind of right relating to liberty, dominion or obligation"; and that "there is no right but is capable of declarator."[79]

Among the numerous forms of declarator, which may be either affirmative or negative, disclosed by the Scotch forms[80] are declarations of marriage and of nullity of marriage,[81] of legitimacy, of bastardy,[82] of putting to silence, the common form of negative declaratory action, by which the defendant is by summons given a limited time to bring forward his action or have a decree of perpetual silence pronounced against him;[83] of property interests of all kinds, including title, easements and servitudes, liens and burdens on the land;[84] of the so-called "non-entry duties";[85] of the so-called "expiry of the

[76] *Ibid.* 179.

[77] (1849) 41 LAW MAGAZINE, 180.

[78] 4 Stair, 3, 47; 4 Erskine, *Principles of the Law of Scotland* (20th ed.) 1, 25, 46. See also Mackay, *Manual of Practice in the Court of Session* (Edinburgh, 1893) 175.

[79] 4 Stair, 3, 47; *ibid.*, 39, 15.

[80] See 4 *Scots Style Book,* s. V, Declarator.

[81] Fraser, *Husband and Wife* (2d ed.) 1238, 1244.

[82] The action to declare a child a bastard cannot be brought in English law. *Yool v. Ewing* [1904] Irish Ch. 434, 445.

[83] This procedure is also well known in Roman-Dutch law as practiced in South Africa. See Morice, *English and Roman-Dutch Law* (2d ed.) 377; Voet, Bk. XLVII, tit. 10; De Villiers, *The Roman and Roman-Dutch Law of Injuries* (Cape Town, 1899) 143. 4 Nathan, *Common Law of South Africa* (Grahamstown, 1907) chap. XVIII. On the Scotch action of putting to silence, see Fraser, *op. cit.* 1244.

[84] 1 Bell, *Commentaries on the Law of Scotland* (7th ed. by McLaren) 785.

[85] Declaration of the landlord's "right" of re-entry for failure to pay rent or other dues. It is a technical action described in 1 Bell, *op. cit.* 22.

legal" term of redemption;[86] of the forfeiture of rights;[87] of property in or right of succession to moveables; of trust, validity of trust-deed, power to revoke a trust-deed, or that trust instruments are *ultra vires*;[88] of partnership;[89] of proving the tenor,[90] and other miscellaneous actions, including those rescissory actions which merely declare a deed or other instrument null and void, without any declaration or judgment against the defendant.[91]

The Scotch law recognizes three forms of the declaratory action: (1) the pure declarator alone; (2) the declarator with prayer for possessory or petitory relief ("conclusions"); and (3) the "declaratory adjudication." The first is confined purely to the declaration of jural relations. The law of Scotland, instead of making such declaration optional, makes it in certain cases a condition precedent before an action for coercive relief can follow. So in cases of statutory forfeitures, proving the tenor of a lost instrument, foreclosing the equity of redemption, relying on title based upon prescriptive possession, seeking to show that facts and circumstances prove or disprove a marriage or legitimacy where that conclusion is denied; partition of heritable property among heirs; and in other cases, the request for a declaration must precede the request for further relief.[92] It is common practice, as in England, to combine the request for affirmative relief with one for a declaration, and often where the former is denied, the latter may still be granted. The commentators assert that "wherever a right upon which an action is to be founded is not clear as to its existence or extent, a declarator is proper, and sometimes necessary, before an action can proceed to enforce the right."[93] The "declaratory adjudication" is a method of vesting a legal title in the

[86] This is the action by which a creditor who holds security in the form of an interest in land may ask the court to declare that, ten years having expired since the due date of the debt, he is entitled to an irredeemable title to the property, the debtor having allowed the ten years to expire during which he had a legal power of redemption. The creditor calls on the debtor to exercise his power of redemption, otherwise to have it judicially declared as foreclosed. This is one of the cases in which the declarator is essential—not merely optional—to the acquisition of an irredeemable title by the creditor. See *Ormiston v. Hill* (1809, Scot.) Fac. Coll. 155 and 1 Bell, *op. cit.* 743.

[87] Mackay, *Manual, op. cit.* 79, 378. The declaration of the forfeiture of a lease is known as a declaration of "irritancy." See case of *Wylie v. Heritable Securities Invest. Assn.* (1871) 10 M. 253.

[88] 2 Bell, *op. cit.* 386, note 3.

[89] 2 Bell, *op. cit.* 562, and cases there cited.

[90] That is, proving the tenor of lost or destroyed instruments by which a jural relation is required to be established. See *Lord Lovat v. Fraser* (1845) 8 D. 316; Erskine, *op. cit.* 542-544.

[91] Bell, *Dictionary and Digest of the Law of Scotland* (7th ed. by Watson) 291; Erskine, *op. cit.* 542.

[92] Mackay, *op. cit.* 78, 79, 374-379.

[93] Bell, *Principles,* sec. 1995; Mackay, *Manual,* 378.

person who has the beneficial interest.[94] Strictly speaking, while a declaration of title is of course made, the judgment here, as in some of the cases mentioned above, is more than declaratory. It constitutes the certification or vesting of a new jural relation, and is, therefore, investitive in its nature, whereas the declaratory judgment proper merely declares a jural relation which is already in existence, the determination having retrospective force to the period when the right or other jural relation commenced. There is, for example, a sharp distinction between the declaration of the nullity of a "marriage" which never really was a marriage at all, as was contemplated by the negative jactitation proceeding in England, and the declaration of the nullity of a marriage voidable at the option of one of the parties. The former judgment is declaratory, the latter investitive. Closer analysis of the numerous actions which in Scotland are called declaratory reveals that many of them fall within the class of what we would call investitive, and the conclusion cannot be avoided that it is only in the unlimited scope given to the negative declaratory action, in the willingness to declare facts and "future interests,"[95] and in such special proceedings as the declaration of bastardy that Scotch law affords greater opportunity than the English law of the present day for the declaratory action.

As in other systems of law, the exercise of the power to render a declaratory judgment is discretionary with the court; the plaintiff must show a substantial interest in the declaration; the jural relation he asserts must be disputed;[96] the declaration of rights, etc., to be enjoyed in the future must serve some useful purpose in settling disputed or doubtful legal relations, so that it will not be made if it cannot constitute *res judicata*.[97] Yet recent decisions show a greater disposition to declare contingent rights by anticipation, provided there is some one to oppose the declaration.[98] While the Scotch courts like other courts affirm that they will not declare abstract propositions nor the meaning of statutes[99] unless directly affecting private jural relations,[100] they are more readily disposed to declare mere facts, when serving some useful purpose, than are the courts of Germany or England.[101]

[94] *Dalziell v. Dalziell* (1756) 16 M. 204; 1 Bell, *Commentaries*, 751.

[95] *Infra.*

[96] See *Magistrates of Edinburgh v. Warrender* (1863) 1 M. 887, by Lord Neaves.

[97] Thus, where a declaration was asked of the power of a plaintiff under a trust deed to give certain sums by will provided he had no issue, the declaration was declined because it would not bind unborn children. *Harvey v. Harvey's Trustees* (1860) 22 D. 1310, 1326.

[98] *Chaplin's Trustees v. Hoile* (1890) 28 Sc. L. Rep. 51; *Falconer Stewart v. Wilkies* (1892) 29 Sc. L. Rep. 534.

[99] *Todd v. Higginbotham* (1854) 16 D. 794.

[100] *Leith Police Commissioners v. Campbell* (1866) 5 M. 247.

[101] *Infra.*

England. England owes the advantages it enjoys under the declaratory action to the agitation of Lord Brougham, begun in 1828. In a notable speech delivered on February 7 of that year in the House of Commons on the state of the courts of common law,[102] he pointed out the great benefits enjoyed by Scotland in enabling persons who apprehend future litigation to proceed by way of a declaratory action to have their rights determined, and he mentioned its particular application to doubtful or disputed interests in property. He introduced bills for the adoption of the practice in 1843, 1844, 1846, 1854 and again in 1857, the last of which resulted in the Legitimacy Declaration Act, 1858.[103] He obtained a very considerable following, particularly among the judges, and on numerous occasions in the House of Lords successive chancellors, including Lord Thurlow, Lord Loughborough, Lord Eldon and others among their successors, called attention to the merits of the Scotch action of declarator. Speaking with reference to the negative declaratory action where the plaintiff has no affirmative cause of action, a proceeding not possible in England until 1883, Lord Brougham in 1846 in delivering his opinion in the House of Lords in the case of *Earl of Mansfield v. Stewart*[104] said:

> "I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy, under it, the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here, you must wait till a party chooses to bring you into court; here, you must wait till possibly your evidence is gone; here, you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding."[105]

Lord Brougham lived to see his proposed reform partially adopted in an amendment to the Chancery Procedure Act of 1852, to which we shall recur presently, and in the Legitimacy Declaration Act, 1858. By that Act it was provided that any natural-born British subject, or any person whose right to be deemed a natural-born subject depends wholly or in part on the validity of a marriage, being domiciled in England, may apply by petition to the Court for Matrimonial Causes praying for a decree declaring that his marriage was or is a valid marriage; and the court is to have jurisdiction to hear and decide the application, and to make its decree declaratory of the validity or invalidity of the marriage.[106]

[102] 18 Hansard (2d ser., 1828) col. 127, col. 179.

[103] 21 & 22 Vict. ch. 93.

[104] 5 Bell, 139, 160.

[105] The object of this suit was to obtain a declaration that the vendor could convey a good title to Lord Mansfield, the vendee, who threatened to withhold payment on the ground that the title was in doubt.

[106] A person not domiciled in England cannot, therefore, obtain a declaration

Mention has already been made of the Act of 1850[107] which enabled persons interested in questions cognizable in the Court of Chancery to state special cases for the opinion of the court as to "the construction of any Act of parliament, will, deed, or other instrument in writing, or any article, clause, matter or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with"; and enabled the court

> "to determine the questions raised therein or any of them, and by decree to declare its opinion thereon, and so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and that every such declaration of the said Court contained in any such decree shall have the same force and effect as such declaration would have had . . . if contained in a decree made in a suit between the same parties instituted by bill; Provided . . . that if the Court shall be of opinion that the questions raised . . . cannot properly be decided upon such case, the said Court may refuse to decide the same."

As an incident to regular actions, the Court of Chancery had occasionally made declarations, notably in the construction of wills and trust settlements. This power was apparently vastly enlarged by the Chancery Procedure Act, 1852, section 50, which provided that

> "No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right *without granting consequential relief.*"

Judicial construction, however, greatly narrowed these important grants of power. Vice-Chancellor Wood in 1853 confined the authority given by these Acts practically to cases "where it should appear to be necessary for the administration of an estate or as incidental to coercive relief";[108] and Chancellor Turner in 1856 stated that section 50 did not extend the

> "cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declaration by the directions which, under the old practice, have been necessarily consequent upon them."[109]

And the section was further restricted by the traditional aversion of the courts to making findings as to the enjoyment of rights in the

of the validity of his marriage, although it was celebrated in England. *Countess De Gasquet James v. Duke of Mecklenburg-Schwerin* [1914] P. 53, 70.

[107] *Supra*, p. 7. An Act to Diminish the Delay and Expense of Proceedings in the High Court of Chancery in England, 13 & 14 Vict. ch. 35, secs. 1, 14.

[108] *Garlick v. Lawson* (1853) 10 Hare, App. XIV.

[109] *Lady Langdale v. Briggs* (1856) 8 De G. M. & G. 391, 427.

future or as to those which depend upon a contingency.[110] The power was further narrowed by the construction that the courts could make a declaration only as an incident to coercive relief or where there was a "right" to consequential relief for which the plaintiff had merely chosen not to ask. Where there was no "right" to consequential relief, no declaration would be made.[111] As this proceeding arose before the Judicature Acts, it is possible to comprehend that it may have appeared to a court of equity as something of an anomaly to make a declaration as to a legal right when not preliminary or incidental to any equitable relief; and that it may have appeared inexpedient to determine a question concerning a jural relation which had not actually arisen and might never arise. This view of the court's power inevitably made it impossible to institute a proceeding for a negative declaration by which a plaintiff who fears that the defendant will bring an action against him can ask *quia timet* by way of anticipatory defence, so to speak, for a declaration that the defendant has no just claim against him.[112]

But with the reforms instituted by the Judicature Act of 1873 the ground was laid for the adoption of new rules of court. Order XXV, rule 5, of the Supreme Court Rules of 1883[113] now paves the way for a wide application of the declaratory judgment. It provides:

> "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Although this language would seem to make it clear that the plaintiff need no longer have a cause of action entitling him to affirmative relief—the only purpose which appears to have been intended by the insertion of the words "or not,"—it was nevertheless only in 1915[114] that the Court of Appeal fully admitted that a plaintiff may ask the court not only affirmatively to declare his right or power, but also negatively to declare the no-right or disability of his opponent defendant (*i. e.*, the privilege or immunity of the plaintiff). As late as 1906 the court had expressed the opinion[115] that only a plaintiff who had an affirmative cause of action could request a declaration. It is also to be noted that the power to make declarations under Order XXV,

[110] *Lady Langdale v. Briggs, supra; Bright v. Tyndall* (1876) 4 Ch. D. 189, 196.

[111] *Rooke v. Lord Kensington* (1856) 2 K. & J. 753, 760.

[112] *Jackson v. Turnley* (1853) 1 Drew, 617, 627; *Rooke v. Lord Kensington, supra.*

[113] 7 Statutory Rules and Orders, 54.

[114] *Guaranty Trust Co. v. Hannay* (C. A.) [1915] 2 K. B. 536. The decision was by two judges against one. See *supra,* p. 9.

[115] See *North Eastern Marine Engineering Co. v. Leeds Forge Co.* [1906] 1 Ch. 324; (C. A.) [1906] 2 Ch. 498.

rule 5, is most freely exercised in the Chancery Division, much less frequently in the King's Bench Division, and not at all in the Probate Division, to which it has been held not to apply.[116]

Furthermore, the amended rules of 1893 have introduced Order LIV, A:[117]

> "In any Division of the High Court, any person claiming to be interested under a deed, will, or other instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

The exercise of the power is expressly made discretionary. This is in addition to the power long exercised by courts of equity in advising and directing trustees in their powers, duties and responsibilities, and the determination of any question arising in the administration of a trust "affecting the rights or interests of the persons claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust" or affecting other matters.[118]

It will have been observed that Order LIV, A, covers the construction of wills, deeds, contracts and other written instruments; and the reports of the Chancery Division indicate that more than half the declaratory judgments rendered arise in the construction of wills or deeds of trust under this Order.[119] The simplicity of the new procedure when contrasted with the old tedious and expensive litigation which any dissatisfied member of a family could render necessary may be envied by us. New Jersey appears to be the only state which has directly profited by the English example in this respect,[120] although a few states permit bills to construe a will.

Since the "forms of action" have been abolished in England, and a plaintiff needs now in his writ or pleadings merely to state the facts on which he relies, the declaration of "rights" under Order XXV,

[116] *De Gasquet James v. Duke of Mecklenburg-Schwerin* [1914] P. 53, 71.

[117] Statutory Rules and Orders (1893) 552.

[118] Order LV, 7 Statutory Rules and Orders Revised, 126.

[119] The originating summons is exceedingly simple. It reads, after the caption:

"Let B of ——— in the county of ——— within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of A of ——— in the county of ——— who claims to be [state the nature of the claim] for the determination of the following questions: [State the questions.]"

[120] The New Jersey Act respecting the Court of Chancery, Suppl., approved March 30, 1915, Public Laws 1915, ch. 116, p. 185, sec. 7, reads as follows:

"Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determination thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested." See *In re Ungaro's Will* (1917, N. J. Ch.) 102 Atl. 244.

rule 5, and LIV, A, is obtainable without technicality and inexpensively. So successful in improving the administration of justice has the declaratory action been that Order XXV has been adopted *verbatim* in the codes of procedure or rules of court of Australia, New Zealand, Queensland, Victoria and other Australian states;[121] of Ontario, British Columbia, Manitoba and other Canadian provinces; and of India and Ceylon.

India. In India, where the declaratory action has been extensively used, Act VIII of 1859, section 15, embodied the provisions of section 50 of the Chancery Act of 1852. This section was repealed by Chapter VI of the Specific Relief Act of 1877 (Act I of 1877, section 42) which, while making it unnecessary for the plaintiff to be entitled to any coercive relief, hence admitting the negative declaratory action, bars the courts from making declaratory decrees *only* in cases where the plaintiff, being able to seek coercive relief, omits to request it. This legislation, therefore, adopts the early construction of the German Supreme Court and the present German practice requiring a plaintiff to seek his strongest remedy, and overlooks the advantages which a friendly suit enjoys over a hostile litigation in determining one's legal position. In his valuable commentary on the Specific Relief Act, Collett mentions[122] as the prerequisites of the declaratory decree: 1. There must be a present existing interest, however distant the actual enjoyment may be; 2. There must be some present danger or detriment to be averted by the declaration; and 3. A man entitled to sue for an executory decree cannot seek only a declaratory decree.[123] Section 283 of the civil procedure code of 1882 also enables a person claiming an interest in property attached under an execution of judgment to institute a suit to establish his interest in the property, which suit acts as a stay of execution. A similar proceeding is provided in Ceylon.[124]

United States. While the declaratory judgment, *eo nomine*, has

[121] In New South Wales they appear to have retained without change the form of section 50 of the Chancery Act of 1852.

[122] Collett, *The Law of Specific Relief in India* (Calcutta, 1882) 224.

[123] On the Indian practice in making declaratory decrees see 1 Stokes, *Anglo-Indian Codes* (Oxford, 1892) 934; Broughton, *Notes of Cases decided upon points of Civil Procedure* (Calcutta, 1884) 93; and Sarkar, *The Civil Procedure Code* (Act XIV of 1882) secs. 11, 283, and the cases there digested. Under the proviso that the executory decree must be claimed if feasible, the court will not deny the declaratory action unless "satisfied beyond all doubt" that the plaintiff ought to seek "further relief and yet has not done so." *Aisa Siddika v. Bidhu Sekhar Banerjee* (1913) 17 CALCUTTA L. J. 675.

[124] 1 Pereira, *Institutes of the Laws of Ceylon* (Colombo, 1901) 339. Such a proceeding in the form of trial of title by sheriff's jury is fairly common in the United States. The purpose, however, is to protect the sheriff. See *Sellers v. Thomas* (1900) 185 Ill. 384 and Puterbaugh, *Common Law Pleading and Practice* (9th ed.) 1127.

not yet been adopted in the United States, it is proper to observe that many of our states have without formal recognition admitted its efficacy in various departments of the law. A careful search for instances of its application would probably disclose many cases. But its employment is spasmodic and desultory. The few examples that we shall cite will serve merely to show that our special necessities have occasioned recourse to the declaratory judgment without conscious adoption, and that its formal admission into our practice would be merely an extension to a wider field of an institution whose efficacy we have already admitted and which is even more thoroughly attested by a prolonged practice of over thirty-five years in England and of many more years in other countries.

Among the few instances that we shall notice in the United States, the majority indicate the adaptability of the declaratory judgment to the construction of written instruments and to the determination of conflicting titles to real property. Attention has already been called to the New Jersey statute of 1915, based on the English Order LIV, A, according to which the chancery court may construe any will, deed, or other written instrument without giving further relief.[125] Illinois and some other states also admit bills in chancery for the construction of wills, notwithstanding that no trust or questions of trust or other questions are involved therein.[126]

The declaratory judgment in substance, although not in name, has proved particularly effective for the determination of disputed or doubtful questions of title to realty. In England and some other countries, since the abolition of real actions, this has become the regular method of trying title. We have long been familiar with the equitable action for the removal of a cloud from title; and this action, so far as it does not demand the destruction of instruments or of other obstructing clouds, but merely a declaration of the plaintiff's title, is in effect a declaratory action. But the artificial restrictions with which this equitable remedy is encumbered have led to the enactment of statutes which remove many of these limitations; and some of them permit not merely a person in possession but any claimant of an equitable or a legal interest in the land (and in some states even in personal property) to institute an action for the trial of the title.[127] Thus, a recent Connecticut statute provides:

> "An action may be brought by any person claiming an interest in real or personal property

[125] Public Laws 1915, ch. 116, sec. 7, p. 185. *In re Ungaro's Will* (1917, N. J. Ch.) 102 Atl. 244. In this section the declaratory judgment, as such, is expressly recognized.

[126] Hurd's Illinois Statutes, 1911, c. 22 (Chancery) sec. 50, p. 166. See *Barton v. Barton* (1918, Ill.) 119 N. E. 320.

[127] The statutes are cited in 6 Pomeroy, *Equity Jurisprudence* (3d ed.) sec. 735. See also *Wehrman v. Conklin* (1894) 155 U. S. 314, 15 Sup. Ct. 129.

> against any person who may claim any interest adverse to the plaintiff for the purpose of determining such adverse interest and to clear up all doubts and disputes, and to quiet and settle the title to the same."[128]

Somewhat analogous to these actions are the proceedings by a person in possession for the statutory period against a person claiming under a record title to have the latter's claim declared void and to confirm his own title.[129]

Our law is also familiar with the action by which an equitable claimant can obtain a judgment impressing a trust upon the legal title in his favor,—*i. e.*, a judgment declaring the plaintiff to be *cestui,* and therefore entitled in equity to property to which another has legal title;[130] or a judgment declaring a supposed trust to be invalid.[131] In fact, actions are frequent for the declaration of the nullity of instruments or transactions, although such declarations are usually incidental to further relief.[132] When brought by prospective legal defendants to anticipate their defenses under void or voidable instruments they are declaratory actions. In this category are actions by insurance companies to declare the invalidity of policies obtained by fraud, sometimes before any loss has occurred; or by those prospectively liable under negotiable instruments.[133] On the whole, the courts

[128] Pub. Acts, 1915, ch. 174, sec. 1. See *Ackerman v. Union & New Haven Trust Co.* (1915) 90 Conn. 63, 96 Atl. 149; (1917) 91 Conn. 500, 506, 100 Atl. 22, where the court, Case, J., was most reluctant in admitting the fact that this statute was in effect analogous to the English Order XXV, rule 5. The case involved the construction of a will. See also *Deaver v. Napier* (1918, Minn.) 166 N. W. 187; *Coel v. Glos* (1908) 232 Ill. 142, 83 N. E. 529—action by vendee under a contract of sale against a third person claimant of title.

[129] See the cases cited in 6 Pomeroy, *op. cit.* sec. 730, n. 17. In many states such actions cannot be brought. They cannot be brought in Canada. *Miller v. Robertson* (1904) 35 Can. Sup. Ct. 80; *Reaumé v. Coté* (1916 A.D.) 35 Ont. L. Rep. 303. Equitable actions to establish and confirm title in case of lost records and under other circumstances are admitted in Wisconsin, Laws of 1878, ch. 252, Statutes, 1911, sec. 661 h; and in Illinois, Hurd's Statutes, 1911, ch. 22, p. 167.

[130] *Donohoe v. Rogers* (1914) 168 Cal. 700, 144 Pac. 958. See the interesting case of *Porten v. Petersen* (1918, Minn.) 166 N. W. 183, where a vendee not yet entitled to specific performance because all the installments of the purchase price had not yet been paid, the defendant vendor having repudiated the contract by refusing to receive further installments, nevertheless obtained a judgment declaring his equitable title.

[131] *Scheibner v. Scheibner* (1917, Mich.) 165 N. W. 660.

[132] See the case of *Slingerland v. Slingerland* (1910) 109 Minn. 407, 410, 411, 124 N. W. 19, where a woman sued for a declaration that a contract with her husband for the release of her dower was void because obtained by fraud. The action was held not premature.

[133] *Commercial Mutual Life Insurance Co. v. McLoon* (1867, Mass.) 14 Allen, 351; *Globe Mutual Life Insurance Co. v. Reals* (1879) 79 N. Y. 202; see also

are reluctant to make such declarations, and only in exceptional cases will they relieve the petitioner by anticipation from the usual duty of setting up his legal defenses when sued.[134]

By a Wisconsin statute,

> "when the validity of any marriage shall be denied or doubted by either of the parties, the other party may commence an action to affirm the marriage, and the judgment in such action shall declare such marriage valid or annul the same and be conclusive upon all persons concerned."[135]

So far as this judgment declares the validity of a marriage, it is purely declaratory, and its purpose the exact opposite of the old English "jactitation" proceeding. So far as it declares the marriage null, provided it was merely voidable and not void *ab initio,* it is not purely declaratory but rather investitive, or, more accurately, divestitive in its nature.

Other illustrations are to be found in statutes authorizing judgments proving the tenor of lost instruments or proving the validity, when contested, of instruments to be recorded.[136] Judgments declaring statutes unconstitutional are declaratory, though they are usually accompanied by some specific relief, and the classic example of the trustee's request for advice and directions under a trust instrument is illustrative of this form of action. The examples given above will suffice to show that the formal adoption of the declaratory judgment in our practice, far from constituting a radical innovation in our legal institutions, would merely serve to extend the application of remedies already employed.

In part II of this article an analysis of numerous declaratory actions and judgments will be undertaken with a view to determine the scope of and the limitations upon this useful form of procedure.

(To be continued)

the English cases of *Brooking v. Maudslay, Son & Field* (1888) 38 Ch. D. 636, and *Honour v. Equitable Life Ass. Soc.* [1900] 1 Ch. 852, in which the declarations were refused.

[134] These actions are in effect requests for negative declarations. An instance of a prospective legal defendant instituting a proceeding to compel the prospective plaintiff to sue is afforded by the unusual statute of New Mexico of March 11, 1903, ch. 23, sec. 2, which enables a corporation, anticipating a suit against it by a person who has sustained a personal injury, to compel that person to file his complaint. So, in prize law, the owner of a captured vessel or goods can compel the captor to institute prize proceedings. *The Zamora* (H. L.) [1916] 2 A. C. 77.

[135] Wisconsin Statutes, sec. 3252. See *Kitzman v. Kitzman et al.* (1918, Minn.) 166 N. W. 792.

[136] *e. g.,* California, Statutes 1905, p. 604; Civil Code, sec. 1203.